In The

Supreme Court of the United States

October Term 1975

No. 75-817

NEBRASKA PRESS ASSOCIATION; OMAHA WORLD-HERALD COMPANY; THE JOURNAL-STAR PRINTING CO.; WESTERN PUBLISHING CO.; NORTH PLATTE BROADCASTING CO.; NEBRASKA BROADCASTING ASSOCIATION; ASSOCIATED PRESS; UNITED PRESS INTERNATIONAL; NEBRASKA PROFESSIONAL CHAPTER OF THE SOCIETY OF PROFESSIONAL JOURNALISTS/SIGMA DELTA CHI; KILEY ARMSTRONG; EDWARD C. NICHOLLS; JAMES HUTTENMAIER; WILLIAM EDDY,

Peitioners,

vs.

THE HONORABLE HUGH STUART, JUDGE, DISTRICT COURT OF LINCOLN COUNTY, NEBRASKA; ERWIN CHARLES SIMANTS, INTERVENOR; AND THE STATE OF NEBRASKA, INTERVENOR,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of Nebraska

BRIEF OF RESPONDENT HUGH STUART

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BRIEF OF THE HONORABLE HUGH STUART, JUDGE DISTRICT COURT OF LINCOLN COUNTY, NEBRASKA

OPINIONS AND ORDERS BELOW

The respondent herein agrees with the statement made in petitioners' brief with regard to the opinions and orders below.

JURISDICTION

The decision of the Supreme Court of Nebraska was issued on December 1, 1975. Certiorari was granted on December 12, 1975. The jurisdiction of this Court was invoked pursuant to 28 U. S. C. § 1257 (3) (1973).

QUESTIONS PRESENTED

1. Whether freedom of the press as outlined in the First Amendment to the Constitution of the United States grants an unqualified right to the press to publish any and all matters involved in a criminal trial or whether it is necessary to balance the Sixth Amendment rights of the defendant to a trial by a fair and impartial jury against the rights of the press under the First Amendment by allowing courts to enter restrictive orders as to what may be printed by way of pretrial publicity.

2. Whether a trial court, when confronted with evidence of press coverage and based upon a knowledge of the community in which a trial is to be had and the amount of publicity being generated in the community concerning such a case, may constitutionally place restriction upon the dissemination of pretrial publicity.

3. Whether the order of the Nebraska Supreme Court entered on December 1, 1975, can be sustained as a matter of law and fact.

4. Whether the issues presented in the instant case are moot.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances."

The Sixth Amendment of the Constitution of the United States provides as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the Constitution of the United States provides in part as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The respondent agrees generally with the Statement of the Case as set forth in petitioners' brief at pages 4 through 23. However, respondent does not agree with the statements as set forth on page 21 of the petitioners' brief that the question involved before this Court has not been motted by the expiration of the Nebraska Supreme Court's order and, further, disagrees with and does not accept as accurate the affidavit made at Joint Appendix, pp. 14-16, ¶8, of the Statement of the Case of petitioners herein—the affidavit of Kiley Armstrong.

SUMMARY OF ARGUMENT

Initially, we establish the parameters of both the First and Sixth Amendments and demonstrate that neither holds a constitutionally preferred position. This co-equal constitutional status has acted as a catalyst whenever the First Amendment freedom of the press impinges upon an accused's fair trial right. Case law amply demonstrates that Sixth Amendment rights can be, and have been, effectively denied the criminally accused because of the free reign of the newspaper and broadcast media. In an effort to even the balance in favor of the accused, this Court has suggested various procedural adjustments, including prior restraints, in order to insure a fair trial before an impartial tribunal.

In light of the fact that prior restraints on dissemination of information have been allowed in various situations where interests other than First Amendment freedoms are also at stake, it is our contention that such

restraints are clearly warranted where required to preserve the fair trial right of an accused whose very life may hang in the balance. This is especially true when the publicity which is restrained is not of such a nature that a temporary delay in its widespread circulation could have any detrimental effects on society.

Finally, we point out that the evidence presented at the hearing convened by Judge Stuart demonstrated a clear threat to the impartiality of any potential jury panel. Faced with a situation in which all of the alternatives suggested in *Sheppard* would prove inadequate to alleviate this threat, Judge Stuart found it necessary to employ the only other method suggested by this Court for the purpose of providing the defendant with a fair trial, that of prohibiting newsmen from reporting information which tended to link the accused with the crime. In these circumstances, the Nebraska Supreme Court was clearly correct in holding that the order of a temporary delay in the reporting of certain facets of the upcoming case was within the court's power and was justified.

ARGUMENT

I.

In extraordinary circumstances Sixth Amendment rights may be effectively denied the criminal defendant because of extensive pretrial publicity.

There can be no understating the importance and desirability of a free press in our modern democracy. Free

press has served as the people's sentinel, maintaining surveillance over the entire spectrum of governmental activity. It is this continuous scrutiny of government by the press which insures that such powers are not abused.

This Court, however, has never succumbed to the mistaken belief that First Amendment freedoms are absolute and unlimited. *Poulos v. New Hampshire,* 345 U. S. 395 (1953). For a simple perusal of the relevant cases indicates that those "essential rights contained in the First Amendment in some instances are subject to the elemental need for order without which the remaining constitutional guarantees of civil . . . [liberty] would be a mockery." *United Public Workers v. Mitchell,* 330 U. S. 75, 95 (1947).

It is important to remember that whenever particular constitutionally protected conduct is limited in some degree, because of inconsistencies with other protected freedoms, the courts have a duty to determine which of the conflicting interests demands the greatest protection under the circumstances presented. *American Communications Ass'n. v. Douds,* 339 U. S. 382 (1950).

Thus, it appears from even slight investigation that the "preferred" position of the First Amendment is not nearly as firmly entrenched in our constitutional system as petitioners propose. What the relevant case law does indicate, and quite dramatically, is that whenever a legitimate conflict does exist between the right to a free press and the right to a fair trial, the balance is swung in favor of fair trial rights. More specifically, it is a fundamental tenet of our constitutional system that persons accused of crime possess the right to a fair trial under the Sixth

and Fourteenth Amendments to the Constitution. Such right has been referred to as "the most fundamental of all freedoms." *Estes v. Texas,* 381 U. S. 532, 540 (1965). Indeed, a conviction cannot stand if it results from the state's failure to provide a trial free from prejudice. *Rideau v. Louisiana,* 373 U. S. 723, 726-27 (1963).

> ". . . [I]t is the same right of a fair trial, to one accused of crime, that guarantees all other freedoms, including freedom of speech and of the press. For without the right to a fair trial those freedoms would lack any means of vindication in the face of governmental oppression." See, *Allegrezza v. Superior Court,* 47 Cal. App. 3rd 948, 952, 121 Cal. Rptr. 245, 247 (1975).

To insure the fair trial required by the Sixth and Fourteenth Amendments, the defendant has been vested with a plethora of individual rights. Among these rights are trial by jury, judge's ability to set aside verdicts contrary to law and facts, requirement that the trial be conducted under strict court procedures and following time-tested rules of evidence and the requirement that criminal proceedings be tried before a fair and impartial jury. At the present time, however, there is increasing concern that the effectiveness of such basic and fundamental protections as these may be effectively overcome by the variable of pretrial publicity.

This is not to say that the right to freedom of the press is not also a protected freedom under the Constitution. This Court has recognized in *Gorsjean v. American Press Co.,* 297 U. S. 233 (1936), that the fundamental rights which are safeguarded by the first eight amendments to the Constitution enjoy an equality of protec-

tion from governmental interference. Various reported decisions have held that the right to freedom of the press exists co-equally with other constitutional rights and must be afforded the same constitutional protections from undue interference by the government. The same is not true, however, in cases in which the First Amendment freedom of press and the Sixth Amendment right to a fair trial inexorably conflict.

This Court in *Kovacs v. Cooper*, 336 U. S. 77 (1949), upheld a city ordinance banning the use of sound trucks in residential areas. In response to the argument that such an ordinance violated the First Amendment freedom of speech, the Court said:

> ". . . The preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be insensible to claims by citizens to comfort and convenience. To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself." 336 U. S. at 88.

Likewise, in the case of *NLRB v. Federbush Co.*, 121 F. 2d 954 (2nd Cir. 1941), Judge Learned Hand said:

> ". . . The privilege of 'free speech,' like other privileges, is not absolute; it has its seasons; a democratic society has an acute interest in its protection and cannot live without it; but it is an interest measured by its purpose." 121 F. 2d at 957.

Therefore, it is an established principle that the freedoms guaranteed by the First Amendment are not absolutes, and may be altered or restricted when the exercise of competing privileges requires such action. Our analysis then must lead to the next logical question: Can the

constitutional requirements of insuring Sixth Amendment freedoms present sufficient competing exigencies so as to require a limitation being placed on the co-equal rights provided by the First Amendment? It is respondent's position that relevant case law mandates such action.

One of the first cases to recognize that the Sixth Amendment right to a fair trial could be effectively eliminated by the free reign of competing First Amendment provisions was *Irvin v. Dowd*, 366 U. S. 717 (1961). Factually, *Dowd* was not strikingly dissimilar to the instant case. The defendant was charged with the commission of six murders. Because of massive pretrial publicity, the defendant was granted a change of venue to adjoining Gibson County, a primarily rural county with some 30,000 inhabitants. The Court there vacated the conviction of murder and resultant death sentence, after a determination that a flood of pretrial information and comment by newspapers, radio, and television deprived the defendant of a fair trial before an impartial jury. It is noteworthy that the sentence was vacated by the Court, despite the fact that the jurors agreed to be fair and impartial. In his concurring opinion, Mr. Justice Frankfurter captioned the proceedings as ". . . [a] miscarriage of justice due to anticipatory trial by newspapers instead of trial in court before a jury." In commenting on the inability of a fair trial to be had in light of the unbridled freedom of the press displayed in the case, he stated:

> ". . . [S]uch extraneous influences, in violation of the decencies guaranteed by our Constitution, are sometimes so powerful that an accused is forced, as a practical matter, to forego trial by jury. . . ." 366 U. S. at 730.

The case of *Estes v. Texas*, 381 U. S. 532 (1965), dramatically demonstrates this constitutional conflict. In *Estes*, claims of jury prejudice arose from massive pretrial publicity totalling eleven volumes of press clippings, in addition to televised courtroom activities. After a review of the results of the publicity surrounding the trial, the Court agreed that the publicity, including trial broadcasts, ". . . inherently prevented a sober search for the truth." 381 U. S. at 551, and thus denied defendant his constitutional guarantee to a fair and impartial trial. The Court also noted that the two-day pretrial hearing was also the target of a great degree of publicity, and remarked that, ". . . Pretrial can create a major problem for the defendant in a criminal case." "Indeed it may be more harmful than publicity during the trial for it may well set the community opinion as to guilt or innocence." 381 U. S. at 536.

This language is extremely noteworthy in that it isolates the crucial issue in the free press-fair trial dilemma. It establishes as a matter of law that the most crucial time for the defendant is the pretrial period. It has also been scientifically established that earlier information is more influential than later information, and that first impressions and opinions are very difficult to shift. C. HOVLAND, ORDER OF PERSUASION 60 (1957); HOVLAND, JAMES & KELLEY, COMMUNICATIONS AND PERSUASION II (1953). Moreover, several empirical studies have pointed out that prejudice often does result from press publicity. *See, e. g.*, Padawer-Singer & Barton, *Free Press-Fair Trial*, in THE JURY SYSTEM: A CRITICAL ANALYSIS (1975); Jaffe, *The Press and the Oppressed—A Study of Prejudicial News Reporting*

in Criminal Cases, 56 J. CRIM. L. C. & P. S. 1 (1965). In an experiment conducted by Mary Dee Tans and Steven H. Chaffee, the results demonstrated that potential jurors do prejudge guilt on the basis of news stories. Tans & Chaffee, *Pretrial Publicity and Juror Prejudice*, 43 JOURNALIST QUARTERLY 647 (1966). Furthermore, the experiment indicated that the more information provided, the more willing potential jurors are to make such a prejudgment. Also, the authors found that "the most damaging single element in the stories was the police report that the suspect had confessed. This is also the condition under which the incidence of judgment is highest." *Id.* at 652. Thus, it is clear that pretrial publicity does pose a threat of jury prejudice.

While we believe that the procedures established in *Sheppard v. Maxwell*, 384 U. S. 333 (1966), may effectively assure both the rights of the press and the accused to operate without infringement upon one another during the trial, we cannot agree that such procedures may effectively maintain the impartiality of the proceedings before the jury is selected. "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U. S. 133, 136 (1955). Primary importance, of course, is the question of guilt or innocence, and thus the fairness of the jury ultimately selected to make such determination is crucial, since, ". . . only the jury can strip a man of his liberty or his life." *Irvin v. Dowd*, 366 U. S. 717, 722 (1961); *Groppi v. Wisconsin*, 400 U. S. 505, 509 (1971). Assuming the integrity of the jury to be the paramount concern, judicial procedures must effectively insure the integrity of this body. This imperative of jury

integrity presents no real problem once the jury has been selected, for at that point the prejudicial aspects of media coverage can be effectively removed by the simple process enunciated in *Sheppard, supra,* (i. e. sequestration and jury admonition).

A completely different situation arises, however, when a jury has not been called, and prospective jury veniremen are under no compulsion to avoid massive doses of pretrial publicity. There is no effective judicial sanction which may be imposed on these prospective jury members which will, in effect, insure their impartiality. The spectrum of the problem mushrooms when the heinousness or notoriety of the crime is great, and the prospective pool of jurors limited. See, *Maine v. Superior Court*, 66 Cal. Rptr. 724, 438 P. 2d 372 (1968). The problem seems to leapfrog. The more bizarre or notorious the crime or criminal, the greater the degree of pretrial publicity, and the more likely the possibility of improper jury influence.

This Court recognized this problem in *Estes, supra,* and commented that although the media served an important function in its continuous monitoring of governmental actions, ". . . its exercise must necessarily be subject to the maintenance of absolute fairness in the judicial process." *Estes v. Texas*, 381 U. S. 532, 539 (1965). Unfortunately, the Court did not elaborate on just how such "absolute fairness" could be maintained in such situations.

Perhaps the most important decision handed down by this Court in the area of free press and fair trial, was that of *Sheppard v. Maxwell*, 384 U. S. 333 (1966). This

seminal case involved the murder trial of Dr. Sam Sheppard, and the bizarre events surrounding the case, especially the deluge of almost relentless press coverage, which prompted the Court to refer to the proceedings as a "Roman Holiday." 384 U. S. at 356. The Court was quick to note the basic conflict between First and Sixth Amendment provisions, and to place these freedoms in perspective. Noting the historically important role that the press has played in providing public scrutiny of judicial proceedings, the court found that where there is, ". . . no threat or menace to the integrity of the trial, . . . we have consistently required that the press have a free hand, even though we sometimes deplored its sensationalism." *Sheppard v. Maxwell,* 384 U. S. 333, 350 (1966).

The Court then addressed itself to the issue of pretrial and trial publicity seriously affecting the fairness of the proceedings, and concluded that such publicity may be so extensive and persuasive as to deny a defendant's right to a fair and impartial jury. The Court stated:

> ". . . [C]ourts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Corroboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures." 384 U. S. at 363.

The Court there further stated that the trial courts might find it necessary, in extraordinary circumstances to proscribe extrajudicial statements in an effort to insure the impartiality of the triers of fact, the jury.

Also of importance was the burden placed on the trial court to guard against the possible prejudicial effects of such media coverage. In finding that the, ". . . state trial judge did not fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community. . . ." 384 U. S. at 363, the opinion placed on the trial court the affirmative duty to "adopt strong measures to insure that the balance is never weighed against the accused." 384 U. S. at 362.

> "If publicity during the proceeding threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception." 384 U. S. at 363.

Even more recently, this Court addressed the situation in *Branzburg v. Hayes*, 408 U. S. 665 (1972). Although not directly involving the central issue of the prejudicial effect of pretrial publicity, the case did deal with a conflict between the competing values of free press and the effective administration of justice. In deciding whether media reporters could be required to divulge their sources of information in the interest of the efficient functioning of the judicial process, the court effectively faced the same free press-fair trial dilemma proposed by *Sheppard v. Maxwell, supra.* In arguing that under certain circumstances sources of information must be divulged by reporters, the Court was forced to qualify the free press rights advanced by the media. In establishing "[t]he prevailing rule . . . that the press is not free to publish with impunity everything and anything it desires," 408 U. S. at 683, this court stated flatly:

> ". . . [T]hey [newsmen] may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal." 408 U. S. at 685.

Thus the cases indicate that the trial court is under an affirmative duty to protect the interests of the defendant in a criminal trial, and this duty may be accomplished by court imposed sanctions, including the restriction of media coverage when such circumstances demand its use. Therefore, grounded on both principle and precedent, Judge Stewart had both the authority and the duty to issue the protective order in the instant case.

Whenever pretrial, or even trial publicity is found to have so prejudiced a jury or community so as to make fair trial an impossibility, courts have attempted to offset the effect of the publicity by various procedural adjustments. These adjustments have generally been employed after the publication or broadcast has occurred and thus have been geared to allow the press to be free from prior restraint.

> "These adjustments have included (1) the change of venue to remove the trial to an area not effected by the publicity; (2) the examination of prospective jurors on the *voir dire,* with the view of eliminating those who may have been influenced; (3) the isolation of juries in protracted cases; (4) the postponement of trial for substantial periods to allow the effect of prejudicial publicity to wear off; and (5) the reversal of convictions where this is necessary to assure justice." See, Lewis F. Powell, Jr., *The Right to a Fair Trial,* 51 A. B. A. J. 534 (June 1965).

In the same light, this court in *Sheppard v. Maxwell,* 384 U. S. 333 (1966), stated:

". . . But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. . . . If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences . . ." 384 U. S. at 363.

(1) Change of Venue.

We agree that the procedures which have been developed from the relevant case law are generally adequate to insure the defendant a fair trial by an impartial jury but it should be noted that these procedures cannot insure such an outcome in every situation. Thus while we agree that the *Sheppard* procedures should be implemented whenever possible to insure the accuseds' rights we cannot agree that these measures are the sole curatives available, or that their use be attempted before other measures can be taken. *Sheppard*, for example, recommends the changing of trial venue in certain circumstances. It should be noted, however, that the particular circumstances of this case preclude the effective use of that procedure.

Neb. Rev. Stat. § 29-1301 (1975 Supp.), provides:

> "All criminal cases shall be tried in the county where the offense was committed, except as otherwise provided in sections 29-1301.01 to 29-1301.03 or section 24-903, or unless it shall appear to the court by affidavits that a fair and impartial trial cannot be had therein. In such a case the court may direct the person accused to be tried in some adjoining county."

Thus Nebraska by statutory grant allows change of venue only to adjoining counties. The appropriateness of this statute is not specifically at issue in this case, but the particular results which its use fosters are of significant impact when viewed in light of the unique circumstances involved. The multiple murders allegedly prepetrated by Erwin Charles Simants were the source of concern and dismay for a great number of local inhabitants, and news reports of the crime attracted not only local coverage, but also regional and national attention, such attention obviously known by the area's inhabitants who viewed, read and heard such statewide, regional and national reports. These facts take on even greater significance when viewed in light of the population figures for the adjoining counties to which a change of venue could be effected.

Those counties to which a change of venue could be effected include:

County	1970 Population
Keith	8,487
Perkins	3,423
Hayes	1,530
Frontier	3,982
Dawson	19,537
Custer	14,092
Logan	991
McPherson	623

Thus, the situation here is not unlike *Irvin v. Dowd*, 366 U. S. 717 (1961), where massive localized publicity

flooded even adjoining counties, thus making the impaneling of an impartial jury impossible. See also, *Moore v. Dempsey,* 261 U. S. 86 (1923).

In the same light, it cannot be said that trial court must always agree to a change of venue before protective orders can be constitutionally applied. The ABA standards allow the trial judge to base his decision on the change of venue issue on his own determination of the type, frequency and timing of the prejudicial reports. ABA Standards, *Fair Trial and Free Press,* § 3.2 (c), at 119 (approved draft (1968)). "In addition, firm precedent demands that the court take into account whether the publicity is sufficiently localized that potential jurors in another area would be free of any taint from exposure to the press, enabling the change to serve its purpose." *United States v. Chapin,* 515 F. 2d 1274, 1288 (D. C. Cir. 1975).

The above factors, when viewed in light of the fact that all adjoining counties are served by the same local, regional and national news media as Lincoln, County, can lead to no other conclusion than that a change of venue under such circumstances will be virtually ineffectual as a curative for massive pretrial publicity, especially that of local origin, which was by far the most acute.

(2) Continuances.

In addition to the granting of a change of venue, *Sheppard, supra,* also provides for the granting of continuances for those cases in which the pretrial publicity

presents a real and serious threat to the integrity of the trial. The theory here involved is that the passage of time may help to dilute the deleterious effect of the pretrial publicity. *Calley v. Callaway,* 519 F. 2d 184 (5th Cir. 1975). While the use of the continuance may, in some cases, achieve the desired result of providing a jury free from publicity prejudice, it should be noted that such continuances may prove detrimental, if not violative, of the accused's constitutionally protected right to a speedy trial. It is also questionable as to whether the continuance serves its purpose in cases such as this one, where the entire population of a small community is acutely aware of the relevant facts and the position of the accused in relation to those facts. Such were the circumstances in *Maine v. Superior Court,* 66 Cal. Rptr. 724, 438 P. 2d 372 (1968), where no fair trial could be had because of a prevailing community hostility toward the defendant, caused in part by the extensive publicity which blanketed the small community. Noting the nature of the charges (i. e. kidnapping, forceable rape and assault with intent to commit murder), and the deep emotional feelings of the community residents, the court refused to grant a continuance of the case, stating:

> ". . . While a lengthy continuance might sufficiently protect the accused in some cases, it does not do so here. Delays may be an efficious antidote to publicity in medium and large cities, but in small communities, where a major crime becomes embedded in the public consciousness, their effectiveness is greatly diminished. . . ." 66 Cal. Rptr. at 732, 438 P. 2d at 380.

The American Bar Association has likewise taken the position that while the use of continuances could possibly

assure a fair trial in light of prejudicial news disclosures, the continuance could also effectively deny other rights of the defendant and the sovereign's right to preserve the orderly administration of justice.

> ". . . A continuance, if it is to be long enough to dissipate the effects of the potentially prejudicial publicity, may require the defendant to sacrifice his right to a speedy trial and its purpose will be defeated if the publicity is renewed when the case finally comes up." See, Reardon, Report of the American Bar Association, *Standards Relating to Fair Trial and Free Press,* at 75 (1966) (the ABA Legal Advisory Committee on Fair Trial and Free Press).

The conclusion of that report was that the use of the continuance as a tool in highly publicized trials offered only "limited utility," to the trial court, and was in need of supplementation by other means.

In *Groppi v. Wisconsin,* 400 U. S. 505 (1971), the court addressed the question of the desirability of the use of continuances in cases involving massive pretrial and trial publicity. The Court there stated:

> "One way to try to meet the problem is to grant a continuance of the trial in hope that in the course of time the fires of prejudice will cool. But this hope may not be realized, and continuances, particularly if they are repeated, work against the important values implicit in the constitutional guarantee of a speedy trial. . . ." 400 U. S. at 510.

The right to a speedy trial, recognized as a constitutional requisite in *Klopfer v. North Carolina,* 386 U. S. 213 (1966), has been found essential "[1] to prevent undue and oppressive incarceration prior to trial, [2] to minimize anxiety and concern accompanying public accusation, and [3] to limit the possibilities that long delay will impair the ability of the accused to defend himself." *United States v. Ewell,* 383 U. S. 116, 120 (1966). Since the imposition of any continuance raises the possibility that such evils may occur, and based on the fact that no trial judge can effectively determine the amount of time necessary to eliminate jury prejudice, nor assure himself or the defendant that future publicity might not again force a continuance, it seems only logical that continuances are not the preferred solution.

In addition to the principles set out above, Judge Stuart was also constrained by statutory enactment, specifically Neb. Rev. Stat. §§ 29-1205 et seq. (1974 Supp.), which provide that criminal trials must occur within six months of the date the accused is charged. As for continuances, the statute provides:

> ". . . in criminal cases in the district court the court shall grant a continuance only upon a showing of good cause and only for so long as is necessary, taking into account not only the request or consent of the prosecution or defense, but also the public interest in prompt disposition of the case." Neb. Rev. Stat., § 29-1206 (1974 Supp.).

The statutes further provide that failure to bring the defendant to trial within six months shall result in the defendant's "absolute discharge from the offense charged." Neb. Rev. Stat. § 29-1208 (1974 Supp.).

When viewed in light of constitutional and statutory requirements and the disfavor with which the continuance is viewed in current decisional law, it is evident that Judge Stuart had no alternative but to discount the use of a continuance as a viable alternative to the facts presented in this case.

(3) Voir Dire Examination.

In addition to the granting of continuances and changes of venue, courts have generally relied on the use of the voir dire examination to eliminate unfavorable jurors who have been influenced by publicity and other variables occurring prior to trial. Unfortunately, this procedure does not always prove "adequate to effectuate the constitutional guarantee." *Groppi v. Wisconsin*, 400 U. S. 505, 510 (1971).

This court has, on several occasions, held that a juror's voir dire assurance may be unreliable if "deep and bitter prejudice" against a defendant is found, see, e. g., *Irvin v. Dowd*, 366 U. S. at 727-728, or where massive prejudicial publicity has saturated a community prior to the trial, see, *Sheppard v. Maxwell*, 384 U. S. at 353-356.

In *Irvin, supra*, the court reversed the defendant's conviction on grounds of pretrial publicity prejudice, despite the fact that the jurors had, on voir dire, denied any prejudice and agreed to act impartially. The Court commented in that case:

> ". . . No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father. . . ." 366 U. S. at 728.

At this point it is important to recall the nature of the case from which this action sprang. Erwin Charles Simants had been charged on six separate counts of murder while perpetrating or attempting to perpetrate one or more sexual assaults. These offenses were crimes of violence and passion. It is important to note that the decisions in *Irvin, supra*, and *Sheppard, supra*, involved

cases in which defendants were charged with violent and gruesome first degree murders, crimes with marked propensity to arouse and inflame passions, create widespread shock and fear in the community, and encourage public outcries for retribution against the defendant. Obviously, such factors could influence juror's decisions, although such jurors might be highly reluctant to admit such on the voir dire. "The totality of the circumstances controls whether the likelihood of prejudice is too great to permit the jurors' avowals of impartiality to be accepted." *United States v. Liddy*, 166 U. S. App. D. C. 102, 509 F. 2d 428, 435 (D. C. Cir. 1974). As Judge Aldisert states in his dissenting opinion in *United States v. Schiavo*, 504 F. 2d 1 (3rd Cir. 1974):

> ". . . As a prophylactic measure, voir dire inquiry is to be encouraged; as a guaranteed method of insuring the trial's integrity, it leaves much to be desired." 504 F. 2d at 24.

Although courts have often referred to the benefits and detriments of the voir dire examination, little empirical research has ever been done concerning its overall effectiveness as a selection tool. One such study, however, has concluded that the value of the voir dire examination is marginal at best. Broader, *"Voir Dire Examinations: An Empirical Study,"* 38 So. Cal. L. Rev. 503 (1965). As for the nature and effectiveness of the voir dire examination, the study concluded that "voir dire is grossly ineffective [as a screening mechanism] . . . jurors often, either consciously or unconsciously, lie on voir dire." *Id.* at 528.

Petitioners, in their brief, contend that voir dire presents an effective method of screening jurors in cases in-

volving pretrial publicity. The court must, however, be mindful of two important factors. First, the voir dire examination is by its nature an investigative and not a curative tool. Its ability lies not in preventing the disastruous effect of the pretrial publicity, but simply in avoiding the "Roman Holiday" and hollow formality which could result from holding the trial in such circumstances. If prejudice is discovered by the "post-publication" voir dire, the most that can be accomplished is the declaration of a mistrial, and this declaration can only be achieved by the sacrifice of the accused's right to a fair and speedy trial, and the frustration of society's desire for the swift and effective administration of justice.

Secondly, the cases and empirical conclusions set out in this brief illustrate the concern of courts and social scientists alike that voir dire may not provide an adequate mechanism to insure trial reliability. "The law must be sympathetic to this viewpoint, and must make the sympathy meaningful in a practical world of public trials." *State v. Van Duyne*, 43 N. J. 369, 386, 204 A. 2d 841, 850 (1964). The trial court can no longer rely on voir dire, but must determine for itself whether pretrial publicity may become so pervasive and so prejudicial that a fair trial cannot be had.

(4) Reversal of Convictions.

It is obvious that the use of reversals to overturn convictions based on improper and prejudicial publicity is no cure to the problem, but simply a final assurance of fairness to the individual accused. Although necessary to protect the right of a defendant to a fair trial, the reversal should not even be considered as an alternative,

but instead as an expedient. "Such reversals cast a heavy burden, financial and otherwise, on the public and the defendant." *State v. Van Duyne, supra*, 43 N. J. at 387, 204 A. 2d at 851. While a reversal may prove necessary or advantageous in preventing a classic miscarriage of justice, its use, ". . . may involve the expense and inconvenience of a second trial, and if a second trial cannot be had, may result in the freeing of a guilty man, who but for the unfairness of his initial trial, would have been punished for his crime." Reardon, Report of the American Bar Association, *supra*, at 75.

(5) Sequestration of the Jury.

The use of the court's power of sequestration of the jury, as announced in *Sheppard v. Maxwell, supra*, is an important and essential tool to be applied in any case involving the threat of prejudicial publicity. Effective use of this power can help to insure the integrity of those ultimately chosen as jurors, and serves the concurrent function of reducing the limits of any restrictive order to the absolute minimum time necessary to insure the fairness of the overall process. Although sequestration places a more substantial burden on the individuals selected as jurors, as well as a greater financial burden on the state, its use is of unquestionable value in cases of this nature.

One of the primary dangers with pretrial publicity is its unchecked impact on potential jurors. Before the jury is actually selected, the entire adult community represents a potential jury. Each individual may possibly be called to serve on the jury panel. Obviously, these community members are under no compulsion or admonition to avoid the pretrial publicity filtering through the

community. This is especially true in extraordinary or bizarre cases which are covered more extensively by the press and generally are more exciting, intriguing, or newsworthy than other criminal cases. Thus, the only effective method of insuring the jury's impartiality, when the curatives of *Sheppard* are not viable, is to limit the scope of the pretrial publicity. To this end the Supreme Court of Nebraska in this case fully protected the Sixth Amendment rights of Erwin Charles Simants without imposing unreasonable restraints on the petitioners. Freedom of the press is not absolute.

II.

Temporary restraints on First Amendment freedoms are permitted in extraordinary circumstances where no other means exist by which to protect other fundamental interests upon which the functioning of our society depends.

As has been established, the freedoms protected by the First Amendment cannot be regarded as absolute privileges to be invoked without consideration of other constitutionally guaranteed rights. This fact is reflected in Justice Blackmun's dissenting opinion in *New York Times Co. v. United States*, 403 U.S. 713 (1971):

> "The First Amendment, after all, is only one part of an entire Constitution. . . . Each provision of the Constitution is important, and I cannot subscribe to a doctrine of unlimited absolutism for the First Amendment at the cost of downgrading other provisions. First Amendment absolutism has never commanded a majority of this Court. . . ." 403 U.S. at 761.

While the First Amendment protects against both prior restraint and subsequent punishment, prior restraint has been more sharply disfavored because of the danger of governmental censorship inherent in such a context. Yet it is clear, and this Court has held, that prior restraints must be permitted in some situations where interests other than free speech are also at stake.

In *Near v. Minnesota*, 283 U.S. 697 (1931), this Court for the first time explicitly recognized that exceptions existed to the general rule of no prior restraint:

> "The objection has also been made that the principle as to immunity from previous restraint is stated too broadly if every such restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to previous restraint is not absolutely unlimited. . . ." 283 U.S. at 715-716.

Of course, as was made clear by Justice Butler in his dissenting opinion, the Minnesota statute which was at issue in *Near* did not operate as a prior restraint in the historical sense of the phrase, since it did not authorize administrative control in advance as had been formerly exercised by the licensors and censors of which Blackstone spoke. Ever since the decision in *Near*, however, the type of limitation on reporting in which the publisher is informed that if he circulates certain matter he will be subject to p u n i s h m e n t has been commonly referred to as a prior restraint. Therefore, respondent acknowledges that the court order which is now at issue is a prior restraint under today's terminology, while reminding the Court that this is something quite different from the governmental censorship which was known as a prior restraint at the time of the adoption of the Bill of Rights.

In the majority opinion in *Near,* Chief Justice Hughes indicated that prior restraints, as he now defined the term, would not be prohibited in "exceptional cases," and as illustrative of such cases he mentioned three situations. The first illustration referred to restraints which would be permissible when the nation was at war, the second related to obscenity, and the third involved sedition. It is clear, however, that the exceptions to the rule of no prior restraints were not limited to only these three illustrations, and that the definition of "exceptional cases" can include other diverse situations. Chief Justice Burger, dissenting in *New York Times Co. v. United States, supra,* emphasized this fact:

> ". . . Of course, the First Amendment right itself is not an absolute, as Justice Holmes so long ago pointed out in his aphorism concerning the right to shout 'fire' in a crowded theater if there was no fire. There are other exceptions, some of which Chief Justice Hughes mentioned by way of example in Near v. Minnesota. There are no doubt other exceptions no one has had occasion to describe or discuss. . . ." 403 U.S. at 749.

As new situations have arisen, this court has repeatedly confirmed the fact that exceptions to the rule against prior restraint do exist. In *Kingsley Books, Inc. v. Brown,* 354 U.S. 436 (1957), this Court approved a statutory scheme that permitted suppression of allegedly obscene matter for two days pending a judicial determination as to whether or not the material was, in fact, obscene. In *Carroll v. President & Comm'rs of Princess Anne,* 393 U.S. 175 (1968), this Court recognized that an injunction forbidding the staging of a political rally may be permissible, as long as notice is first given to those

who would be subject to the injunction, and a hearing is held. Furthermore, federal circuit courts have held that court orders which place limits on the dissemination of information related to judicial proceedings can be permissible if some type of notice and hearing precede the order. *United States v. Schiavo,* 504 F.2d 1 (3rd Cir. 1974); *United States v. Dickinson,* 465 F.2d 496 (5th Cir. 1972). It can thus be clearly seen that prior restraints on dissemination of information are generally regarded as appropriate in special circumstances, although a due process requirement of notice and a hearing must first be fulfilled. In relation to this last point, it must be pointed out that Judge Stuart, prior to issuing the order now challenged, did give notice to each party and did conduct a hearing at which representatives of the media were present and were allowed to call and question witnesses, to cross-examine the defendant's witnesses, and to present argument.

Decisions of this Court have acknowledged that there is a heavy presumption against the constitutional validity of any prior restraint on expression. *New York Times Co. v. United States, supra; Organization for a Better Austin v. Keefe,* 402 U.S. 415 (1971); *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963). It is obvious that if there is only a presumption of unconstitutionality, there must be some circumstances in which prior restraints are constitutional. What is thus required is an examination of the specific circumstances of each case in order to determine whether the particular restraint on the dissemination of information was justified. As Justice Frankfurter asserted in *Kingsley Books, Inc. v. Brown, supra:*

". . . The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test. The duty of closer analysis and critical judgment in applying the thought behind the phrase has thus been authoritatively put by one who brings weighty learning to his support of constitutionally protected liberties: 'What is needed,' writes Professor Paul Freud, 'is a pragmatic assessment of its operation in the particular circumstances . . .' . . ." 354 U. S. at 441-442.

In assessing the particular aspects of this case, it must continually be remembered that freedom of the press is only one of several rights protected in the Bill of Rights. The Sixth Amendment, as well as the First Amendment, involves rights which must be regarded as fundamental. Justice Jackson, dissenting in *Craig v. Harney*, 331 U. S. 367 (1947), perhaps stated it best:

"The right of the people to have a free press is a vital one, but so is the right to have a calm and fair trial free from outside pressures and influences. Every other right, including the right of a free press itself, may depend on the ability to get a judicial hearing as dispassionate and impartial as the weakness inherent in men will permit. . . ." 331 U. S. at 394-95.

Justice Frankfurter has pointed out that the First Amendment was never intended to be placed in a preferred position in relation to the right of an accused to a fair trial. In a concurring opinion in *Pennekamp v. Florida*, 328 U. S. 331 (1946), he stated:

". . . [T]he purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it. '. . . the liberty of the press is no greater and no less than the liberty of every

subject of the Queen,' Reg. [ina] v. Gray [1900] 2 QB (Eng) 36, 40,—Div. Ct., and, in the United States, it is no greater than the liberty of every citizen of the Republic. The right to undermine proceedings in court is not a special prerogative of the press." 328 U. S. at 364.

In *Maryland v. Baltimore Radio Show, Inc.*, 338 U. S. 912 (1950), in a separate opinion concerning the denial of a petition for certiorari, Justice Frankfurter further developed this concept:

". . . One of the demands of a democratic society is that the public should know what goes on in courts by being told by the press what happens there, to the end that the public may judge whether our system of criminal justice is fair and right. On the other hand our society has set apart court and jury as the tribunal for determining guilt or innocence on the basis of evidence adduced in court, so far as it is humanly possible. It would be the grossest perversion of all that Mr. Justice Holmes represents to suggest that it is also true of the thought behind a criminal charge '. . . that the best test of truth is the power of the thought to get itself accepted in the competition of the market.' Abrams v. United States, 250 U. S. 616, 630, . . . Proceedings for the determination of guilt or innocence in open court before a jury are not in competition with any other means for establishing the charge." 338 U. S. at 920.

In light of the fact that prior restraints are permissible in exceptional cases, together with the fundamental nature of the right of an accused to a fair trial before an impartial jury, it is clear that the constitutional validity of Judge Stuart's order, as modified by the Nebraska Supreme Court, must be upheld. The order related only to pre-trial publicity, which was defined as reporting prior to the empaneling of the jury. Thus, all restrictions

would dissolve as soon as the court, by way of sequestration, would be in a position to insure the impartiality of the jury.

This fact, that the restraint on publication continues only until the empaneling of the jury, separates this case from those where restrictions on the media continue during the course of, or even after, the trial proceedings themselves. In *Times-Picayne Publishing Corp. v. Schulingkamp,* 419 U. S. 1301 (1974), Justice Powell, hearing the case as Circuit Justice, granted a stay of a Louisiana trial court's order which placed restrictions on the media coverage of two defendants accused of committing a highly publicized rape and murder. The order in that case, however, included restrictions on what could be published not only before the trial, but also during the trial. Furthermore, after the two defendants' cases were severed and separate trials were ordered, the court failed to modify the order, so it would have remained in effect until the termination of the last trial. Thus, the stay was granted because the trial court's order went further than was necessary to protect the rights of the defendants. Mr. Justice Powell said:

> "The state court was properly concerned that the type of news coverage described above might be resumed and might threaten the defendants' rights to a fair trial. But the restraints it has imposed are both pervasive and of uncertain duration. They include limitations on the timing as well as the content of media publication, cf. Miami Herald Publishing Co. v. Tornillo, 418 U. S. 241 (1974)." 419 U. S. at 1308.

In a footnote, Mr. Justice Powell added that "respondent has indicated his intention to sequester juries. This will protect many of the hazards that the selective restrictions

on reporting during trial are designed to prevent." *Id.* at 1308, n. 3. It is apparent from these statements that much of the difficulty with the trial court's order was the fact that it would continue in effect longer than necessary to insure the impartiality of the jury. The order which petitioners here appeal, on the other hand, was designed to restrain publication only until the trial was commenced, at which time the jury could be sequestered and the defendant's Sixth Amendment rights could thus be adequately protected. In this way, the order struck the proper balance between the conflicting fundamental rights involved, so that each was protected to the greatest extent possible while acknowledging the existence of the other.

The petitioners' argument that there can be no restraints on the reporting of proceedings occurring in courtrooms which are open to the public, or on the reporting of information contained in public court files, because the press is merely giving publicity to information that is already public begs the question. It is not the fact that the information is available to the public which threatens the fairness of the trial, rather it is the fact that the news media can disseminate the information in such a manner that its impact will tend to create a community-wide belief in the guilt of the accused. In this way, pretrial publicity can threaten the very basis upon which our criminal justice system rests, the presumption that every defendant is innocent until proven guilty in a court of law. It is therefore not surprising that other courts have also restrained the press from reporting portions of the public record of a preliminary hearing. *State v. Meek,* 9 Ariz. App. 149, 450 P. 2d 115 (1969), cert den., 396 U. S. 847 (1969); *Asbill v. Fisher,* 84 Nev. 414, 442 P. 2d 916 (1968),

See also, *People v. Elliott,* 6 Cal. Rptr. 753, 354 P. 2d 225 (1960).

Furthermore, the theory that a "public right to know" demands a finding that the restraints on publication here involved are unconstitutional also does not stand up under critical analysis. The fallacy of this idea has been pointed out by Mr. Justice Powell, in his capacity at that time as President of the American Bar Association:

> "To fashion additional safeguards for fair trial within the framework of the Bill of Rights, we must avoid being confused by generalizations and slogans. There has been a disposition sometimes to equate the news media and the public. Again, some persons have talked about a 'public right to know' as if it were a constitutional right.
>
> "These generalizations miss the point. The essence of the freedom guaranteed by the First Amendment is to permit the unlimited expression of views about matters of public and political concern and to respect the sanctity of individual conscience and belief. We have recognized that there are areas of privacy in which respect for the individual and his rights precludes the satisfaction of public curiosity.
>
> "We must bear in mind that the primary purpose of a public trial and of the media's right as a part of the public to attend and report what occurs there is to protect the accused. When we speak of the constitutional right to a public trial, we do not mean a spectacle before the public at large. The guarantee of a public trial was never intended to protect any right of the public to be entertained. The purposes of this guarantee are to prevent secret trials and to assure through the safeguards of appropriate public scrutiny that the administration of justice is honest, efficient and in conformity with law. The ultimate public concern is not the satisfaction of curiosity

> or an abstract 'right to know.' Rather it is the assurance that trials are in fact fair and according to law." Powell, *The Right to a Fair Trial,* 51 A. B. A. J. 534, 538 (1965) (footnotes deleted).

Of course, it may be felt that cases could exist in which the necessity of informing the public is, due to the issues involved, so vital that restraints will not be permitted even though the possibility of empaneling an impartial jury will be imperiled. In *United States v. Dickinson,* 465 F. 2d 496 (5th Cir. 1972), the Court felt that the need to keep the public informed of the facts brought out at a hearing was particularly compelling, since the issue being litigated concerned charges that elected state officials had trumped up charges against an individual solely because of his race and his involvement in civil rights activities. Quoting from *Wood v. Georgia,* 370 U. S. 395 (1962), the Court declared:

> " 'Particularly in matters of local political corruption and investigation is it important that freedom of communications be kept open and that the real issues not become obscured. . . . ' " 465 F. 2d at 508.

However, under the order of Judge Stuart, as modified by the Nebraska Supreme Court, the only matters which were prohibited from being published concerned confessions or admissions against interest made by the defendant to persons other than news media representatives, and other information strongly implicative of the accused as the perpetrator of the slayings. There is clearly no compelling necessity of the public to require that such information be the subject of constant, wide-spread news coverage before the trial has even begun. Moreover, the effect such coverage would have on the ability to obtain

an impartial jury is obvious. As Mr. Justice Blackmun said in his in chambers opinion in this case, as Circuit Judge:

> "... A prospective juror who has read or heard of the confession in statements repeatedly in the news may well be unable to form an independent judgment as to guilt or innocence from the evidence adduced at the trial." — U. S. —, 96 S. Ct. at 255.

It is therefore clear that where there is an alternative manner of proceeding which will protect the fairness of the trial while still allowing the public to be completely informed during the entire duration of the trial itself, this alternative should be adopted. This is precisely the course which Judge Stuart adopted.

It is true, of course, that where the First Amendment interests are not so compelling as to justify endangering the impartiality of the jury, prior restraints on reporting should not be upheld. There must be a clear showing that the dissemination of the information poses a threat to the fairness of the trial. Various standards have been proposed in regard to precisely how serious the threat must be before temporary restraints may constitutionally be imposed. One suggested standard has been the familiar one of clear and present danger. *Sun Co. v. Superior Court*, 29 Cal. App. 3d 815, 105 Cal. Rptr. 873 (4th Dist. 1973). Another proposed test provides that there is a sufficiently serious threat if there exists a reasonable likelihood of prejudicial news which would make difficult the impaneling of an impartial jury and tend to prevent a fair trial. *United States v. Tijerina*, 412 F. 2d 661 (10th Cir. 1969). And some courts have claimed that only those comments which pose a serious and imminent threat of

interference with the fair administration of justice may be proscribed. *Chicago Council of Lawyers v. Bauer*, 522 F. 2d 242 (7th Cir. 1975); *United States v. Dickinson*, 465 F. 2d 496 (5th Cir. 1972); *Chase v. Robson*, 435 F. 2d 1059 (7th Cir. 1970). In any event, it is clear in this case that the threat to the fairness of the trial was sufficient to meet whatever standard is adopted, and to justify the restraints imposed. In comparing various standards, this Court has said:

> "... Whether the threat to the impartial and orderly administration of justice must be a clear and present or a grave and immediate danger, a real and substantial threat, one which is close and direct or one which disturbs the court's sense of fairness depends upon a choice of words. Under any one of the phrases, reviewing courts are brought in cases of this type to appraise the comment on a balance between the desirability of free discussion and the necessity for fair adjudication, free from interruption of its processes." *Pennekamp v. Florida*, 328 U. S. 331, 336 (1946).

Pennekamp involved an appeal of a contempt conviction, but clearly the requirement of balancing the need for wide public dissemination of the information against the necessity of providing the defendant with a fair trial must also apply in determining whether or not a prior restraint may be imposed. And in weighing that balance, the result must surely come out on the side of insuring the fairness of the trial when the information involved is not related to allegations of public corruption, but rather is confined to facts concerning only the alleged admissions of a private citizen who has been accused, rightly or wrongly, of committing a crime. As was observed in *Chicago Council of Lawyers v. Bauer, supra:*

> ". . . Only slight reflection is needed to realize that the scales of justice in the eyes of the public are w e i g h e d extraordinarily heavy against an accused after his indictment. A bare denial and a possible reminder that a charged person is presumed to be innocent until presumed guilty is often insufficient to balance the scales." 522 F. 2d at 250.

Certainly, whatever interest the public might have in seeing immediate wide-spread publicity concerning alleged confessions, that interest is not so vital as to justify tipping the scales even further against the accused in cases where the public welfare could not possibly be adversely affected by temporary delays on the generation of such publicity.

III.

The record shows that Judge Stuart clearly acted properly when, after holding a hearing at which the threat to the fairness of the proceedings was amply demonstrated, he chose the only course open to him by which to fulfill his affirmative duty to provide the accused with a fair trial.

(1) Judges' Affirmative Duty.

It is a well established principle that trial proceedings are subject to the control of the court, upon whose final authority rests the determination of the form and manner of proceeding which the trial will take. As has been noted previously, the threat of prejudicial publicity is also a variable requiring administration by the trial court in those cases in which such publicity is, or is likely to be, a serious threat to the integrity of the proceeding.

Based on the decision in *Sheppard v. Maxwell*, 384 U. S. 333 (1966), there can be no question, but that Judge Stuart was under an affirmative duty to insure that the fairness of the proceedings were not compromised by any prejudicial news reporting. This Court, in establishing such a duty stated:

> ". . . Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. . . ." 384 U. S. at 362.

Therefore, Judge Stuart, under the affirmative duty placed upon him by *Sheppard, supra,* was required to take steps to insure the integrity of the trial from outside influences. He did just that.

(2) The Threat (Pretrial Publicity).

Accepting as an established principle that trial courts have an affirmative duty to guard against the threat of prejudicial publicity, this analysis then must turn to the next logical question: Were there sufficient circumstances presented by the record in this case, to pose a threat to the integrity of the trial? As has been previously stated, it is respondent's position that the record in the case amply demonstrates the existence of such circumstances.

The record clearly demonstrates that between 20 October 1975 and 23 October 1975 (which was before Erwin Charles Simants was afforded a preliminary hearing), certain newspapers had printed articles (Exhibits 4A, 4C, and 4E of the Joint Appendix) which contained

hearsay information and purported statements of counsel, which, if true, tended clearly to connect Erwin Charles Simants with the murders and which information, if true, was likely to be, or at least some of it would be, presented at the preliminary hearing. In addition, local television and radio broadcasts and national news coverage focused the attention of the public onto the trial and the accused (see remaining exhibits). One of the articles in the North Platte Telegraph also expressed doubt that the Nebraska Bar-Press Guidelines for Disclosing and Reporting of Information Relating to Imminent or Pending Criminal Litigation would apply to a preliminary hearing. Thus, Judge Stuart could quite properly conclude that the evidence from the preliminary hearing, if it was in fact presented, would have again been repeated by at least some of the petitioners. "Those conclusions are reinforced by the fact that in open court at the hearing before the District Judge, counsel for the media stated that it is already doubtful that an unbiased jury can be found to hear the Simants case in Lincoln County." *State v. Simants*, 194 Neb. 797, 236 N. W. 2d 794 (1975). Other counsel for the media at that same hearing stated that "it (the court) would be even justified to have mistrials in order to guarantee the free press." Joint Appendix at p. 71.

The concern of the prosecutor, the defense attorney, and Judge Stuart that pretrial publicity might make it difficult or impossible for the State of Nebraska to afford Erwin Charles Simants a fair trial was not ill-founded. As has been shown, the news media have the power to inform and arose the interests and feelings of a community so that no fair trial can be had. *Estes v. Texas*, *supra; Sheppard v. Maxwell, supra.* Although on occasion such reporting has been of a sensational and bizarre nature, it must be noted that honest and factual reporting by sincere and responsible news services can similarly, though unintendedly, cause identical results, thus frustrating the criminal process.

As is true in the instant case, the most serious problems in this area relate to the pretrial publicity which generally accompanies bizarre and sensational crimes, and the effect such pretrial publicity has on the members of the community from which the jury venire is selected. The greater the degree of sensationalism or "newsworthiness" a particular criminal proceeding contains, the greater the pretrial publicity will be, and extensive publicity raises the possibility of greater degrees of pretrial prejudice due to the so-called "trial by publicity." This possibility of prejudice becomes even more acute when the proceedings occur in a sparsely populated area. See, *Irvin v. Dowd, supra,* and *Maine v. Superior Court, supra.*

As has been pointed out previously, the offenses charged here were violent and gruesome first degree murders and sexual assaults. These crimes have classically engendered hostility and passion in community members and have too often been the target of irresponsible news media, who ". . . [i]ntentionally or inadvertently . . . can destroy an accused and his case in the eyes of the public." *Estes v. Texas,* 381 U. S. at 549. Based on the sparsity of population in the area, the overall tenor of the community following the incident, ample evidence exists on the record to sustain Judge Stuart's determination

that the integrity of the trial could easily be compromised by pretrial media reporting of various aspects of the case.

This is especially true when viewed in light of the evidence which would be presented at the preliminary hearing, and the possibility of the media releasing, prior to trial, evidence of respondent Simant's confession to the alleged crimes. Obviously, the preliminary hearing represented the gravamen of Judge Stuart's problem since such hearing would be the first time that any evidence was made public. There can be no understating of the impact that the gruesome and bizarre facts of the case would have on the residents of this small community. Such facts could clearly, ". . . set the community opinion as to guilt or innocence." *Sheppard v. Maxwell,* 384 U. S. at 362.

The above takes on added dimension when consideration is given to the fact that news reporting need not be sensational or "yellow" to result in prejudice. Even simple factual reports, while not blatantly prejudicial, sometimes tend to pervade the impartiality of the community and the prospective jurors. This is probably most evident in cases in which pretrial press reports discuss factual material which, because of strict rules of evidence, is not allowed to be offered in open court. Thus the jury becomes aware, even before trial, of certain evidence which, because of the strict rules of evidence, is not admissible at the trial. Things such as improper lineup identifications and illegally obtained confessions are examples of the many facts which can be reported on by the media, but not introduced in open court. Such

were the circumstances faced by Judge Stuart in this case, where the fact of Erwin Charles Simants' alleged confession increased the danger that pretrial publicity might result in unfair prejudice.

> "When the fact that an accused confessed or the contents of his purported confession enters into the jury's deliberations, without a prior determination by the court of its voluntariness and admissibility, a conviction will be reversed regardless of how clearly it is supported by other evidence. *Jackson v. Denno,* 378 U. S. 368 (1964). This result attests to the obvious highly prejudicial nature of a confession by the accused. Since the possibility of a confession's not being admitted into evidence is distinct and the probability of prejudice is so great, it should be considered essential to the impartial administration of justice that publications disclosing the existence or contents of a purported confession at any time before its admission as evidence be prohibited." LeWine, *What Constitutes Prejudicial Publicity in Pending Cases?,* 51 A. B. A. J. 942, 946 (1965).

Therefore, based on the unique circumstances presented by the record, the nature of the crime, and the community setting surrounding the prosecution, there is no question but that unrestricted pretrial publicity presented an obvious threat to the integrity of the trial.

(3) Inapplicability of Sheppard Alternatives.

This Court held, in *Sheppard v. Maxwell, supra,* that the Sixth Amendment imposes an affirmative duty on the trial court to take adequate measures to insure defendants fair trials, free of prejudice and disruption. In fulfilling their charge, trial judges have been authorized to take those steps necessary to insure that ". . . the balance

is never weighed against the accused." *Sheppard v. Maxwell,* 384 U. S. at 362.

As stated previously, *Sheppard, Branzburg,* and other decisions have proposed solutions which attempt to deal with the problems faced by trial judges in this area. Obviously, the least obtrusive remedy capable of solving the problem presents the best alternative. Surely, no trial judge would be authorized or expected to change the trial venue when a simple jury admonition would be sufficient to solve the problem. Likewise, the affirmative duty established in *Sheppard, supra,* prohibits the trial judge from selecting a particularly mild curative, when it is obvious that a more radical procedure is warranted.

As has been noted, current decisions have developed a number of possible solutions to the problems presented by prejudicial pretrial publicity. Basically, these procedures can be grouped into six categories. It is respondent's contention here, that five of the six recognized solutions were inapplicable in this case, when viewed in light of the various circumstances facing Judge Stuart. The only available alternative which appeared effective was the use of the protective order, which was ultimately ordered by Judge Stuart.

First, ordering a change of venue proved a poor solution, when reviewed in light of Neb. Rev. Stat. § 29-1301 (1975 Supp.), and the nature of the media coverage involved. Constrained by statute to change venue to an adjoining county, which is served by the same media services as Lincoln County, and aware of the sparsity of population in such counties, Judge Stuart was clearly

justified in declining the use of the change of venue as a solution.

Similarly, the granting of a continuance has been shown to be of marginal utility when viewed in light of the burdens which its use may impose on the defendant, as well as the state. The possibility of infringement on the accused's right to a speedy trial, as well as the statutory constraints of Neb. Rev. Stat. §§ 29-1205, et seq. (1974 Supp.), as discussed *infra,* precluded the effective use of this alternative by Judge Stuart.

Thirdly, various decisions have relied on the use of the voir dire examination to eliminate prejudiced jurors who have been adversely affected by pretrial publicity. While the voir dire has long been recognized as a useful selection tool, its use presents no benefit in those situations in which an entire community is unduly prejudiced against the accused. Our discussion, *infra,* has noted the limited effectiveness of the voir dire in cases such as *Estes v. Texas, supra, Irvin v. Dowd, supra,* and *Sheppard v. Maxwell, supra,* all gruesome murder prosecutions similar to the case faced by Judge Stuart. When viewed in light of the sparsity of population and the heinous nature of the crime, and using the media coverage between October 18 and October 23 as an indicator of the type and volume of future coverage, there can be no question but that a voir dire examination, no matter how extensive or well done, could not effectively guarantee a fair and impartial jury panel.

As for two of the other factors which recent cases have relied on as weapons to combat the effect of prejudicial publicity (i. e., sequestration of juries during trials

and reversals of convictions), respondent fully agrees with their use and effectiveness. It is obvious, however, that the use of these procedures, especially sequestration, must be augmented by other procedures designed to insure the impartiality of the jurors while they are still veniremen. Only by insuring the integrity of those individuals selected to serve as jurors will the use of sequestration prove valuable, for if the jury venire is unduly influenced prior to trial, sequestration will have no effect.

Therefore, after a determination that the above procedures could offer little insurance of impartiality, Judge Stuart was required by his affirmative duty to institute the protective order which is the focus of this proceeding.

> ". . . When a case is finished courts are subject to the same criticism as other people; but the propriety and necessity of preventing interference with the course of justice by premature statement, argument, or intimidation hardly can be denied. . . ." *Patterson v. Colorado,* 205 U. S. 454, 463 (1907) (Opinion by Mr. Justice Holmes.)

(4) The Validity of the Order.

The record shows that adequate precautions were taken to insure that the protective order was indeed necessary and that it was properly entered against petitioners. Aware that prior restraints on expression are permitted only in limited circumstances, Judge Stuart imposed the order only after a careful consideration of the circumstances demonstrated that this truly was one of those exceptional cases of which the Court spoke in *Near v. Minnesota, supra.* On October 23, petitioners filed an

application with the district court for leave to intervene in the criminal proceeding which was being brought against the accused. Judge Stuart, believing that the media had a right to an adjudication of their constitutional claims, allowed their intervention (Joint Appendix 33). He then notified the parties that a hearing would be held later that evening concerning the intervenor's motion to modify or dissolve the order which had been issued by the Lincoln County Court. Although notice was given less than two hours prior to the hearing, this was done at the insistence of petitioners, who desired that the hearing be conducted as soon as possible (Joint Appendix 35-36). At the hearing, counsel for petitioners, as well as the state and the defendant, were allowed to call witnesses, to cross-examine opposing parties' witnesses, and to present argument (Joint Appendix 36-77). The record at the hearing clearly demonstrated, as the Nebraska Supreme Court pointed out in the opinion below, that before the order of the county court was entered against the media, and even prior to the preliminary hearing, newspapers were printing articles which contained hearsay information and purported statements of counsel which tended to connect the accused with the slayings. *State v. Simants,* 194 Neb. 783, 796, 236 N. W. 2d 794 (1975). It was only after this hearing was concluded that Judge Stuart entered any order against petitioners.

In reviewing the action of the district court, the Nebraska Supreme Court carefully examined the record in order to be certain that all proper steps had been taken before the temporary restraints were imposed. No deficiencies were found. Clearly, as the Nebraska Court held, petitioners had submitted themselves to the juris-

diction of the district court by their motion to intervene. *State v. Simants*, 194 Neb. 783, 796, 236 N. W. 2d 794 (1975). Although the permission to intervene was granted erroneously, the petitioners undeniably had approached the district court with the view that it was the proper forum in which to resolve the question of their rights vis-a-vis the rights of the accused. The district court addressed this question, and, after a full hearing on the matter, made a determination as to the respective rights of each. Having done this, the court certainly possessed the power, as well as the duty, to enforce that determination by means of an order directed at those who had originally approached the court requesting the determination.

Respondent further points out that the Sixth Amendment duty to take measures necessary in order to insure fair trials clearly applies to judges as well as to prosecutors. *Sheppard v. Maxwell, supra.* In carrying out this duty, judges have the power, under *Sheppard*, to restrict conduct outside the courtroom of parties, lawyers, jurors, witnesses, court officials, and others connected with the trial process. It is this nucleus of power to assure defendants fair trials which enables courts to restrict the actions of nonparties when those actions threaten the court's ability to function properly. See, *United States v. Schiavo*, 504 F. 2d 1 (3rd Cir. 1974); *United States ex rel. Robson v. Malone*, 412 F. 2d 848 (7th Cir. 1969); and *United States v. Venuto*, 182 F. 2d 519 (3rd Cir. 1950). And, it is this same nucleus of power which provided the basis for the declaration by the plurality opinion in *Branzburg v. Hayes*, 408 U. S. 665 (1972), that "[n]ewsmen . . . may be prohibited from attending or publishing

information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal." 408 U. S. at 684-85.

Clearly, Judge Stuart was acting within the bounds of the court's power when he entered the temporary order against petitioners for the purpose of complying with the duty imposed upon him by the Sixth Amendment and this Court's decisions in *Sheppard* and *Branzburg*. And, he did so only after convening a hearing at which evidence was introduced which clearly substantiated the fact that the threat to the trial was a real one. Thus, as the Nebraska Supreme Court correctly held, the protective order was properly entered against organizations and individuals who had come before the district court, and whose actions prior to the original order by the county court had demonstrated a definite threat to the administration of justice. Further, the district court order was entered only after all due process requirements were met, including a hearing at which a clear showing was made that this was a situation which justified the use of a temporary prior restraint on reporting.

CONCLUSION

Like most of the fundamental precepts of our society, free press and fair trial are in many contexts complementary rather than competing values. A free press may alert the community to criminal activity. It may also aid in apprehending suspects or bringing forth witnesses. Freedom of the press, however, is not absolute.

Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions. Indeed, without the right to a fair trial other freedoms guaranteed by the Constitution of the United States and the Constitution of each of the several states would lack any means of vindication. The integrity of the jury is of primary importance.

Obviously pretrial publication of facts and issues of a particular criminal case may generate bias among persons ultimately chosen as jurors to hear the case. The same could have happened in this case. Specifically, after this Court granted certiorari, Erwin Charles Simants was tried to a jury on the six counts of murder in the first degree of which he was charged (Joint Appendix 4). He was found guilty of murder in the first degree by that jury on each of the six counts. After it returned the verdict Judge Stuart addressed the jurors. He explained to them some of the events that preceded the trial. He advised them that they were released from their obligation as jurors and that they were no longer subject to the oath he gave them as jurors. He then told them he would like to take a straw vote. First he asked how many of them could have been fair and impartial jurors if they had read or heard in the media before this trial started that Erwin Charles Simants had confessed? One juror held up his hand. Judge Stuart then asked how many could not have acted as jurors in this case if they had known that Erwin Charles Simants had confessed before they were called as jurors. Thereupon nine (9) members of the jury held up their hands, one member apparently did not vote. He then asked them how many would have been able to take an oath that they could be

a fair and impartial juror in this case if they had read in the media the text of Erwin Charles Simants' confession before they were called as jurors? One juror held up his hand. Judge Stuart then asked how many of them could not have taken the oath to be a fair and impartial juror if they had read in the media the text of Erwin Charles Simants' confession before they were called as jurors? Thereupon eleven (11) members of the jury held up their hands. The conclusion is inescapable. The judgment of the Supreme Court of Nebraska in this case is in all respects proper. The complaints of the petitioners are untenable.

Respectfully submitted,

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